Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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No 170.6 challenge where appellate opinion merely requires a ministerial act. *Code Civ. Proc.* §170.6 permits the filing of a challenge to the trial judge after he or she is reversed on appeal, "if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter." But where the appellate opinion merely remands and instructs the trial judge to perform a ministerial act (e.g. vacate an order and enter another specified order), the trial judge is not ordered "to conduct a new trial on the matter." Therefore the parties are not entitled to challenge the judge under §170.6 under these circumstances. *C.C. v. Sup.Ct. (Orange County Social Service Agency)* (Cal.App. Fourth Dist., Div. 3; September 11, 2008) 166 Cal.App.4th 1019, [83 Cal.Rptr.3d 225, 2008 DJDAR 14355].

Local governments may impose requirements for wireless facilities. The Telecommunications Act of 1996 (U.S.C. Titles 15, 18, & 47) forbids local governments from prohibiting the providing of wireless services. A three judge panel of the Ninth Circuit had held that this precluded San Diego county from enforcing an ordinance regulating the placement and appearance of wireless telecommunications facilities. The Ninth Circuit *en banc* reversed the ruling and held that the federal statute does not preclude regulation of the placement of wireless facilities. *Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir.; September 11, 2008) 543 F.3d 571, [2008 DJDAR 14334].

Fee sharing attorney cannot sue client without contract signed by client. In *Strong v. Beydoun* (Cal.App. Fourth Dist., Div. 3; September 19, 2008) 166 Cal.App.4th 1398, [83 Cal.Rptr.3d 632, 2008 DJDAR 14737], a clients' lawyer (lawyer #1) had entered into a contract with plaintiff (lawyer #2) to contribute services and share in a contingent fee. After the case settled, the lawyer #1 failed to pay the agreed portion of the fee and lawyer #2 sued the clients on theories of quantum meruit and unjust enrichment, seeking the reasonable value of the services she had rendered. The court of appeal affirmed a judgment of dismissal because the contract had not been signed by the clients as required by Rule 2-200 of the Rules of Professional Conduct. But the court noted that lawyer #2 could have successfully sued lawyer #1 on these theories without the need for a client signature.

State OKs bond issue for renovation and replacement of court houses. The legislature passed a bill, signed by the Governor, providing for a $5 billion bond issue to fund the renovation, or replacement, of 40 dilapidated court houses around the state.

Court has jurisdiction to award attorney fees after dismissing case for lack of personal jurisdiction. In *Shisler v. Sanfer Sports Car, Inc.* (Cal.App. Sixth Dist.; September 25, 2008) 167 Cal.App.4th 1, [83 Cal.Rptr.3d 771, 2008 DJDAR 15028], plaintiff bought a car from a Florida corporation on a web site. After the car arrived in California, plaintiff sued the seller claiming violations of the California Consumer Legal Remedies Act and the Florida Deceptive and Unfair Trade Practices Act. The court granted defendant's motion to quash on grounds it lacked personal jurisdiction over defendant and awarded defendant its attorney fees. Plaintiff appealed, arguing that because the court lacked jurisdiction it did not have the power to award attorney fees.

The Court of Appeal affirmed the award. The court had subject matter jurisdiction and jurisdiction over plaintiff. It therefore properly granted the attorney fees upon defendant's specially appearing to assert its rights to fees.

State court holds that FDA approval does not preclude tort action for failure to warn. The hotly debated issue of whether a pharmaceutical manufacturer may be liable for failure to warn, even though its warning labeling was approved by the FDA, will probably be decided by the U.S. Supreme Court in its next term. Meanwhile, a California

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Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

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appellate court, however, has held that the state tort claim based on inadequate warnings may be maintained. *McKenney v. Purepac Pharmaceutical Company* (Cal.App. Fifth Dist.; September 25, 2008) 167 Cal.App.4th 72, [83 Cal.Rptr.3d 810, 2008 DJDAR 15107].

Court may not prohibit newspaper from reporting trial testimony. In *Freedom Communications, Inc. v. Sup.Ct. (Gonzalez)* (Cal.App. Fourth Dist., Div. 3; September 29, 2008) 167 Cal.App.4th 150, [83 Cal.Rptr.3d 861, 2008 DJDAR 15192], the trial court issued an order prohibiting a local newspaper from reporting trial testimony in a case in which the newspaper is a defendant. Not surprisingly, within days, the Court of Appeal issued a preemptive writ reversing the decision. A prior restraint may be used only in the most exceptional circumstances such as troop movements during a war. This was not such a circumstance.

Moratorium on construction may be a "taking" entitling owner to compensation. Where city issued a prohibition on construction based solely on fear of injury and property damage, it violated the "takings clause" because it did not prove a nuisance. Therefore, because the property owners were deprived of all economically beneficial use of the land, they were entitled to compensation for the taking. *Monks v. City of Rancho Palos Verdes* (Cal.App. Second Dist., Div. 1; October 1, 2008) (As mod. October 22, 2008) 167 Cal.App.4th 263, [84 Cal.Rptr.3d 75, 2008 DJDAR 15265].

Negotiations about property management are not subject to anti-SLAPP statute. *Code Civ. Proc.* §425.16 (anti-SLAPP statute) provides a special motion to strike where the suit arises from the exercise of defendant's constitutional rights of free speech or petition. But, a suit for tortious interference with contract, based on attempts to persuade a party to terminate a lease was not subject to the statute. *Haneline Pacific Properties v. May* (Cal.App. Fourth Dist., Div. 3; October 1, 2008) (As mod. October 14, 2008) 167 Cal.App.4th 311, [83 Cal.Rptr.3d 919, 2008 DJDAR 15330].

Whether uninsured motorist is a "covered person" is for the court, not the arbitrator. *Ins. Code*. §11580.2 requires claims under vehicle insurance policy's uninsured motorist provisions to be resolved by arbitration. But, whether the claimant is an insured under the policy sought to be charged, must first be decided by the court before ordering arbitration of the dispute. *Bouton v. USAA Casualty Insurance Company* (Cal.App. Fourth Dist., Div. 1; October 7, 2008) 167 Cal.App.4th 412, [84 Cal.Rptr.3d 152, 2008 DJDAR 15513].

UCC creates warranty against "rightful claims" of infringement. *California Uniform Commercial Code* §2312(3) implies a warranty that "goods shall be delivered free of the rightful claim of any third person by way of infringement or the like." In *Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.* (Cal.App. Fourth Dist., Div. 1; October 9, 2008) 167 Cal.App.4th 466, [84 Cal.Rptr.3d 182, 2008 DJDAR 15587], the Court of Appeal held that this warranty required the manufacturer of T-shirts imprinted with a design that arguably infringed on the copyright of another company to reimburse the buyer for legal expenses incurred in defending an infringement suit. This was so, even though the buyer had been successful in defending the suit.

Model Code of Civility and Professionalism

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